UNITED STATES BANKRUPTCY COURT SOUTHERN DISTRICT OF NEW YORK	HEARING DATE: February 27, 2002 HEARING TIME: 1:00 p.m.
In re	Case No. 01 B 16034 (AJG)
ENRON CORP., et al.,	(Chapter 11)
Debtors.	(Jointly Administered)

OBJECTION OF THE UNITED STATES TRUSTEE TO MOTIONS OF CERTAIN ENERGY MERCHANTS AND ENRON NORTH AMERICA CREDITORS FOR ORDERS, PURSUANT TO SECTION 1102(A) OF THE BANKRUPTCY CODE, DIRECTING THE APPOINTMENT OF ADDITIONAL COMMITTEES

TO THE HONORABLE ARTHUR J. GONZALEZ, BANKRUPTCY JUDGE:

The United States Trustee for the Southern District of New York (the "United States Trustee") files the following objection to: (a) the motion of a group of energy merchants (the "Traders") for an order, pursuant to section 1102(a) of the Bankruptcy Code, directing the United States Trustee to appoint a traders' committee (the "Traders' Motion"); and (b) the motion of certain creditors to appoint a separate Enron North America ("ENA") creditors' committee (the "ENA Motion," with the Traders' Motion and ENA Motion collectively, the "Motions"). In support of the objection, the United States Trustee respectfully alleges as follows:

I. SUMMARY OF OBJECTION

1. Although couched as routine requests, the Movants seek extraordinary relief, appropriate only in those rarest of instances when a committee appointed by the United States Trustee is not representative of the creditor constituency in a case. These cases do not require an additional committee of Traders or ENA creditors at this time. Three of the fifteen members of the official committee of unsecured creditors (the "Committee") are energy traders. **One of the three**

energy traders on the Committee is the co-chair of the committee. Moreover, at least eight of the members of the Committee are creditors of ENA. Based upon the best information available to the United States Trustee about the Debtors' financial affairs, the Committee adequately represents the Movants. At least at this initial stage, all creditors on the Committee are united in their desire to untangle the Debtors' complicated financial affairs. The Movants do not allege that the Committee is not zealous in its investigation of the Debtors' financial affairs. New facts emerge on almost a daily basis, and the United States Trustee remains open to reconsideration of the Committee's composition, or the formation of an additional committee, as the facts may warrant.

II. FACTS

General

2. The Debtors filed voluntary petitions for relief under the Bankruptcy Code on December 2, 2001 (the "Filing Date") and, in some instances, periodically thereafter. The Debtors have continued in the operation of their businesses pursuant to §§ 1107 and 1108 of the Bankruptcy Code.

3. The Debtors and their approximately 3,500 other direct and indirect affiliates (collectively, the "Enron Companies") provide products and services related to the sale and delivery of natural gas, electricity and communications to wholesale and retail customers.

4. For the fiscal year ended December 21, 2000, the Enron Companies generated $101 billion in annual revenues on a consolidated basis. As set forth in the Enron Companies' Form 10-Q filed on October 31, 2001 for the quarter ending on September 30, 2001, the Enron Companies' consolidated books and records reflected assets totaling approximately $61 billion and liabilities totaling approximately $49 billion.

Formation of the Committee

5. The letter dated December 5, 2001 (the "December 5 Letter") from the United States Trustee announcing the organizational meeting was sent to the largest creditors and parties-in-interest. The United States Trustee also posted the letter on the Court's electronic filing system. The United States Trustee included with the December 5 Letter a questionnaire asking each creditor to provide, inter alia, the following information:

(a) The identity of the creditor;

(b) The debtor against which the claim was asserted;

(c) The amount and nature of the creditor's unsecured claim;

(d) Whether the holder of the claim was an officer or director of any debtor; and

(e) Whether the holder of the claim is related to an officer or director of any debtor or a person in control of any debtor.

A copy of the December 5 Letter is annexed hereto as Exhibit A. Some creditors returned their completed questionnaires to the United States Trustee before the scheduled meeting; others brought the completed questionnaires with them to the organizational meeting.

6. The United States Trustee and her counsel conducted the organizational meeting on December 12, 2001. The meeting took place in the Grand Ballroom at the New York Hilton Hotel at 1335 Avenue of the Americas, New York, New York. Approximately 500 people attended. At the organizational meeting, the following took place:

(a) The United States Trustee's representative gave brief introductory remarks on the procedures for appointing a committee of creditors;

(b) Debtors' counsel Martin Bienenstock gave an overview of the Debtors' financial affairs;

(c) Kenneth Lay, the Debtors' chief operating officer at the time, gave a brief presentation on the Debtors' goals in Chapter 11, followed by a more in depth presentation by Jeffrey McMahon, then the Debtors' chief financial officer; and

(d) Creditors wishing to ask a question had the opportunity to do so. Mr. Bienenstock responded to the majority of questions, but Mr. McMahon also responded to certain questions.

7. Following the presentation, the United States Trustee and her staff collected the questionnaires and adjourned to a private room to deliberate. At that time, the United States Trustee considered seventy questionnaires submitted by creditors that wished to serve on the committee. At various points during the deliberations, the United States Trustee or her staff met with representatives of several creditors to obtain information about the nature and amounts of their claims, as well as their willingness to serve on a committee, and to discuss correspondence sent by some of those creditors to the United States Trustee.

8. Following deliberations, the United States Trustee decided to include the major creditor groups on a committee, which included the following categories of creditors: (a) bank debt, (b) bond debt, (c) traders' debt, (d) surety obligations, and (e) employee claims. In making her decision, the United States Trustee considered the petitions, Local Rule 1007-2 affidavits, the Debtors' corporate information provided by the Debtors and various creditors at numerous meetings, and information that came to light during the Debtors' presentations and questions by creditors at the organizational meeting.

9. Upon review of the information received, and following deliberations, the United States Trustee appointed the following fifteen creditors to the Committee:

(a) JP Morgan Chase & Co.;

(b) Citigroup/Citibank;

(c) ABN AMRO Bank;

(d) Credit Lyonnais New York Branch;

(e) Credit Suisse First Boston;[1/]

(f) National City Bank, as indenture trustee;

(g) Silvercreek Management, Inc.;

(h) Oaktree Capital Management, LLC.;

(i) Wells Fargo Bank Minnesota, N.A., as indenture trustee;

(j) The Bank of New York, as indenture trustee;

(k) St. Paul Fire and Marine Insurance Company;

(l) National Energy Group, Inc.;

(m) Duke Energy Trading and Marketing, LLC;

(n) Mr. Michael P. Moran, individually and as representative of other employees; and

(o) The Williams Companies, Inc.

10. The Committee's composition accurately reflects the proportion of the debt as was known at the time. In order to ensure a representative Committee, the United States Trustee selected three trading creditors, even though their individual claims were far less in amount than those of the banks and bondholders selected for the Committee.

11. In addition, the United States Trustee considered, but decided against, the appointment of more than one committee, in part, because all creditors, at least initially, have a

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[1/] By letter dated December 14, 2001, this member resigned from the Committee. Effective December 21, 2001, the United States Trustee replaced this member with Westdeutsche Landesbank Gironzentrale.

common interest in untangling the complicated financial affairs of the debtors, a process that continues.

12. As noted above, the United States Trustee appointed three creditors holding energy claims: The Williams Companies, Inc., Duke Energy Trading and Marketing, LLC, and National Energy Group, Inc. In addition, the Committee has informed the United States Trustee that eight of the members appointed to the Committee have claims against ENA for $50 million or more. A copy of a letter by Committee counsel to the United States Trustee dated February 4, 2002 is annexed hereto as Exhibit B. Based on the information available to the United States Trustee at the time of selection and subsequent thereto, the Committee as formed is representative of all of the Debtors' unsecured creditors.

Events Subsequent to the Formation of the Committee

13. During the period between December 20, 2001 and January 29, 2002, various parties representing the Movants wrote to the United States Trustee, requesting the appointment of separate committees for Traders or ENA creditors.

14. On December 18, 2001, the United States Trustee met with several of the Traders' representatives. At the meeting, several items were discussed, including the appointment of a Chapter 11 trustee. The attendees did not specifically request the formation of a separate committee at the time. As these parties requested, the United States Trustee also reviewed the factual information contained in the Traders' motion to amend the order confirming the UBS sale.

15. On January 30, 2002, the United States Trustee met with several of the ENA creditors. As these parties requested, the United States Trustee also reviewed the factual

information contained in a letter of Judith Ross, Esq., concerning cash management issues in these cases.

16. After each meeting, the United States Trustee invited responses from various parties-in-interest to address the Movants' concern that certain creditors were not adequately represented on the Committee. The United States Trustee received recommendations from the Committee and Committee members, the Debtors and traders. The Debtors and Committee (and two of the Committee members) objected to the formation of another committee.

17. By letters dated February 5, 2002 and February 6, 2002, the United States Trustee denied the requests by various parties for separate committees. Copies of these letters are annexed hereto as Exhibit C.

The Applications

18. The Movants seek relief on the grounds the Committee does not adequately represent their interests. They base this allegation on their belief that the Committee is dominated by financial creditors of "have not" Debtors. See Traders' Motion at ¶ 36.

19. The Traders assert as follows:

> It is hard to imagine a case that cries out more clearly for the appointment of a separate Trading Debtor committee. The sheer size and complexity of these cases alone make it impracticable for a single committee, regardless of its composition, to adequately represent the Debtors' conflicting creditor constituencies. After all, these are the largest chapter 11 cases in United States history.

Traders' Motion at ¶ 32.

20. Likewise, the ENA creditors assert as follows:

> This case involves a large number of creditors, multiple classes of creditors, and debt greater than $40 billion. Without doubt, this is a large, highly complex case. By their very nature, cases of this type are more likely to need one or more additional committees.

ENA Motion at ¶ 25(a).

21. However, the Movants offer no case law or specific examples in these cases that demonstrate that their sheer size and complexity make it impracticable for a single committee to adequately protect the interests of the major constituencies.

IV. ARGUMENT

22. Section 1102(a)(1) of the Bankruptcy Code provides that, "as soon as practicable after the order for relief under chapter 11 of this title, the United States [T]rustee shall appoint a committee of creditors holding unsecured claims and may appoint additional committees of creditors or of equity security holders as the United States [T]rustee deems appropriate." 11 US.C. § 1102(a)(1). In turn, § 1102(a)(2) provides that, "[o]n request of a party in interest, the court may order the appointment of additional committees of creditors or of equity security holders if necessary to assure adequate representation of creditors or of equity security holders. The United States [T]rustee shall appoint any such committee." 11 U.S.C. § 1102(a)(2).

23. The inclusion of disparate groups within one committee may facilitate the consensual resolution of the conflicting priorities among the holders of unsecured claims and thereby facilitate the negotiation of a consensual plan. See In re Altair Airlines, Inc., 727 F.2d 88, 90 (9th Cir. 1984); In re Barney's, Inc., 197 B.R. 431, 444 (Bankr. S.D.N.Y. 1996); In re Hills Stores, Co., 137 B.R. 4, 7 (Bankr. S.D.N.Y. 1992). A single committee with internal conflicts, whose decisions are not controlled by any single class of creditors, is desirable; that composition leaves the various creditor classes no alternative but to form coalitions and work with one another. Id. Also, separate committees impose additional administrative expenses on the debtor's

estate which adversely affects the debtor's ability to reorganize. In re Orfa Corp. of Philadelphia, 121 B.R. 295, 299 (Bankr. E.D. Pa. 1990).

24. The Committee and its members owe a fiduciary duty to the class they represent. ABF Capital Management v. Kidder Peabody & Co. (In re Granite Partners L.P.), 210 B.R. 508, 516 (Bankr.S.D.N.Y.1997); In re Drexel Burnham Lambert Group, Inc., 138 B.R. 717, 722 (Bankr. S.D.N.Y.), aff'd, 140 B.R. 347 (S.D.N.Y. 1992). As fiduciaries, they are required to be honest, loyal, trustworthy and without conflicts of interest. In re Bohack Corp., 607 F.2d 258, 262 n. 4 (2d Cir.1979) ("[T]he committee owes a fiduciary duty to the creditors, and must guide its actions so as to safeguard as much as possible the rights of minority as well as majority creditors.") (citing Woods v. City Nat'l Bank & Trust Co., 312 U.S. 262, 268-69 (1941)); Johns-Manville Sales Corp. v. Doan (In re Johns-Manville Corp.), 26 B.R. 919, 925 (Bankr. S.D.N.Y. 1983).

25. The Movants have the burden of demonstrating that the Committee inadequately represents their interests. Albero v. Johns-Manville Corp. (In re Johns-Manville Corp.), 68 B.R. 155, 158 (S.D.N.Y. 1986), appeal dismissed, 824 F.2d 176 (2d Cir. 1987). In this regard, the appointment of an additional creditors' committee is an extraordinary request. "[T]he reconciliation of differing interests of creditors within a single committee is the norm, and the appointment of a separate committee is an extraordinary remedy." In re Sharon Steel Corp., 100 B.R. 767, 778 (Bankr. W.D. Pa. 1989); In re Texaco, 79 B.R. 560, 567 (Bankr. S.D.N.Y. 1987) ("Dissident factions of the same class of creditors are not automatically entitled to separate committees."); In re Baldwin-United Corp., 45 B.R. 375, 376 (Bankr. S.D. Ohio 1983) ("Conflicts among creditors are inherent in all bankruptcy cases . . . [Y]et, we do not believe, and we decline to rule, that a separate committee for each equity security interest will engender harmony and alleviate conflict among creditors . . . [T]he opposite would result."); In re Daig Corp., 17 B.R. 41, 43 (Bankr. D. Minn. 1981) (Court denied a motion to reconstitute the creditors' committee to remove the largest and predominant unsecured creditor in order to

negotiate separately with that creditor. The court observed that a statutorily appointed creditors' committee "is purposely intended to represent the necessarily differing interests and concerns of the creditors it represents.")

26. The Movants have failed to meet their burden in demonstrating that an additional committee is necessary.[2/] They have failed to assert specific facts which show a lack of "adequate representation." They have not, for example, alleged that individual members are breaching their fiduciary duties. Compare In re Fas Mart Convenience Stores, Inc., 265 B.R. 427 (Bankr. E.D. Va. 2001) (committee member suspended for breach of its fiduciary duties and conflicts of interest). The Movants likewise have not alleged that the Committee is not representative of the creditor class as a whole or that certain voices on the Committee are being suppressed.[3/] Cf. Manville Corp. v. Equity Sec. Holders Comm. (In re Johns-Manville Corp.), 801 F.2d 60, 62 (2d Cir. 1986) (committee members were not denied the power to formulate a plan or to exercise a voice in its formation); In re Saxon Ind., 39 B.R. 945, 947 (Bankr. S.D.N.Y. 1984) (no need for additional committees where all members have been able to participate in plan formation). As set forth above, the United States Trustee has appointed three traders to the Committee, one of

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[2/] The Traders argue that this Court has *de novo* powers to review the United States Trustee's decision to deny the request for an additional committee. However, this is not accurate. Because multiple committees in a case are so unusual, § 1102 limits judicial review of creditor committee appointments to the narrow issue of "representativeness," and discourages the bankruptcy court from second guessing the United States Trustee in close cases. In re Value Merchants, Inc., 202 B.R. 280, 286 (E.D. Wis. 1996).

[3/] Even though the Committee adequately represents the Movants' interests, the Movants may continue to press what they perceive to be their own unique interests in this case. Under 11 U.S.C. § 1109, all creditors are parties in interest and have standing to raise and appear and be heard on any issue. In re Victory Markets, Inc., 195 B.R. 9, 17 (N.D.N.Y. 1996). Indeed, the Movants individually or collectively may pursue their singular interests, and seek payment of their costs and attorneys' fees pursuant to 11 U.S.C. § 503(b)(3) if their actions result in a substantial contribution in the cases.

which, the Williams Companies, Inc., is the co-chair. The trader-members constitute one-fifth of total Committee membership, mirroring the proportion of trading debt to total debt for the Enron Companies, based upon information received by the United States Trustee. Likewise, ENA creditors have significant voices on the Committee. As set forth in the February 4, 2002 letter sent by the Committee, eight of the members each have in excess of $50 million in claims against ENA. The United States Trustee has not heard of "glaring conflicts of interest between the Trading Debtors' estate and those of the other Debtors" from the trader members of the Committee. See Traders' Motion at ¶ 33. No trader-members have resigned because of an inability to carry out their fiduciary duties. Likewise, no ENA creditors on the Committee have complained about a lack of a voice.

27. The Movants allege that the "financial creditors" dominate the Committee and will naturally assert their own interests. However, as Chief Judge Stuart Bernstein recently observed, "[a]lthough Committee members owe fiduciary duties, they are hybrids who serve more than one master. Every member of the Committee is, by definition, a creditor. Thus, he is in competition with every other creditor for a piece of a shrinking pie. He may assert his rights as a creditor to the detriment of the creditor body as a whole without running afoul of his fiduciary obligations." Rickel & Assoc., Inc. v. Smith (In re Rickel & Assoc., Inc.), 272 B.R. 74, 100 (Bankr. S.D.N.Y. 2002). The United States Trustee submits that all creditors share the goal, at least initially, of unwinding the Debtors' complicated financial affairs. Further, each of the Committee members has retained its own counsel. See Sharon, 100 B.R. at 778 (In deciding not to appoint another committee, the court noted that "each of these interests [on the committee] is represented by active, competent, financially sophisticated and strong-willed representatives and by counsel of

their choice."). The Court and the United States Trustee would learn very quickly if certain members on the Committee believe their voices are being suppressed.

28. Official committees are not designed to provide a speaker's platform for a particular group of creditors. In re Drexel Burnham Lambert Group, Inc., 118 B.R. 209, 212 (Bankr. S.D.N.Y. 1990). Taking the Movants' allegations to their logical conclusion, separate committees would be required for nearly every creditor constituency in these cases – in fact, bank debt and bond debt appear to comprise a much larger aggregate debt than trading debt and therefore these constituencies would also have a strong claim to their own committees. Indeed, if the Court were to grant the Motions, these cases would have not one additional committee, but two, each with overlapping interests. The ENA creditor group appears to be a subset of the trader constituency.[4/] As the Committee already adequately represents the major constituencies, the Movants are not entitled to additional committees at the estates' expense.

[4/] The Traders do not describe their claims in any detail and do not identify which other creditors may be similarly situated to them.

V. CONCLUSION

29. Because the Movants' interests are adequately represented by the Committee as presently constituted, there is no cause to direct the United States Trustee to form an additional committee. The United States Trustee reviews these cases on a daily basis. If the facts of these cases make clear that the Traders or other constituencies need separate protection, the United States Trustee may revisit the issue.

WHEREFORE the United States Trustee requests that this Court issue an order denying the Motions and/or granting other relief that this Court deems appropriate.

Dated: New York, New York
February 22, 2002

Respectfully submitted,

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